

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

EXPORT GLOBAL METALS, INC., an  
Oregon Corporation,

Plaintiff,

v.

MEMKING RECYCLING GROUP, LLC, a  
Texas limited liability company;  
and COMPONENTS & MORE, INC., a  
Texas corporation,

Defendants.

No. 3:13-cv-00747-HU

**FINDINGS AND  
RECOMMENDATION**

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HUBEL, Magistrate Judge:

In the summer of 2012, Plaintiff Export Global Metals, Inc. ("Export Global") agreed to buy roughly 122 metric tons of scrap computer cables from Defendant Memking Recycling Group, LLC ("Memking").<sup>1</sup> At the request of Memking, Export Global wired the funds to Defendant Components & More, Inc. ("Components & More"). Upon receipt and inspection of the shipments in Hong Kong, Export Global discovered that the computer cables were not of the quality (i.e., computer cables that would yield the recovery of 35% copper) and weight agreed upon by the parties.

As a result, Export Global brought this diversity action against Memking and Components & More (collectively, "Defendants") on May 2, 2013, alleging claims for breach of contract, breach of express warranty, breach of the implied warranty of fitness for a particular purpose, and unjust enrichment. Memking now moves to dismiss Export Global's complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(2) for lack of personal jurisdiction. For the reasons that follow, Memking's motion (Docket No. 14) to dismiss should be DENIED.

#### LEGAL STANDARD

Where, as here, "the existence of personal jurisdiction is challenged and the defendant appears specially to contest its

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<sup>1</sup> After reviewing the affidavits submitted by Export Global and Memking, it is apparent there are differing views regarding the facts, namely whether Export Global contracted with Memking or Components & More. As discussed *infra*, absent an evidentiary hearing, this Court only inquires into whether Export Global's pleadings and affidavits make a prima facie showing of personal jurisdiction. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Conflicts between the parties over statements contained in affidavits must be resolved in Export Global's favor. *Id.*

1 presence in the jurisdiction, the plaintiff has the burden to come  
2 forward with some evidence to establish jurisdiction." *DRW-LLC v.*  
3 *Golden Harvest Holdings, Inc.*, No. 3:12-CV-01009-BR, 2013 WL  
4 1296075, at \*2 (D. Or. Mar. 28, 2013) (citation omitted). "The  
5 court may consider evidence presented in affidavits to assist it in  
6 its determination and may order discovery on the jurisdictional  
7 issues." *Id.*

8 When the "court rule[s] on the issue relying only on  
9 affidavits [and/or] discovery materials without holding an  
10 evidentiary hearing," which is the case here, "dismissal is  
11 appropriate only if the plaintiff has not made a prima facie  
12 showing of personal jurisdiction." *Dist. Council No. 16 of Int'l*  
13 *Union of Painters & Allied Trades, Glaziers, Architectural Metal &*  
14 *Glass Workers, Local 1621 v. B & B Glass, Inc.*, 510 F.3d 851, 855  
15 (9th Cir. 2007) (citation omitted). Indeed, as the Ninth Circuit  
16 more recently explained:

17 Absent an evidentiary hearing this court only inquires  
18 into whether the plaintiff's pleadings and affidavits  
19 make a prima facie showing of personal jurisdiction.  
20 Uncontroverted allegations in the plaintiff's complaint  
must be taken as true. Conflicts between the parties  
over statements contained in affidavits must be resolved  
in the plaintiff's favor.

21 *Boschetto*, 539 F.3d at 1015 (citation and internal quotation marks  
22 omitted; brackets deleted).

23 "To determine whether there is personal jurisdiction over a  
24 non-resident defendant in a diversity case, a federal court must  
25 look to the law of the forum state." *W. Helicopters, Inc. v.*  
26 *Rogerson Aircraft Corp.*, 715 F. Supp. 1486, 1489 (D. Or. 1989)  
27 (citing *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1246 (9th Cir.  
28 1984)). Oregon's long-arm statute is co-extensive with federal

standards, so this court may exercise personal jurisdiction if doing so comports with federal constitutional due process. *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir. 1990). Due process requires that a defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310, 316 (1945). The pertinent determination for the court is whether the "defendant's conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

#### DISCUSSION

There are two types of personal jurisdiction: general and specific. If general jurisdiction is inapplicable, the court must then determine whether specific jurisdiction exists. *In re Tuli*, 172 F.3d 707, 713 n.5 (9th Cir 1999).

The parties seem to agree that general jurisdiction is not an applicable basis for personal jurisdiction. Indeed, in the Court's view, there simply is nothing in the record to suggest that Memking engaged in continuous and systematic general business contacts that approximated physical presence in the forum state of Oregon. See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004); *cf. Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 447 (1952). The Court will therefore limit its analysis to whether specific jurisdiction exists.

The Ninth Circuit applies a tripartite analysis to determine whether the exercise of specific jurisdiction over a non-resident is appropriate:

1 (1) [t]he non-resident defendant must purposefully direct  
2 his activities or consummate some transaction with the  
3 forum [state] or resident thereof; or perform some act by  
4 which he purposefully avails himself of the privilege of  
conducting activities in the forum [state], thereby  
invoking the benefits and protections of its laws;

5 (2) the claim must be one which arises out of or relates  
6 to the [non-resident] defendant's forum-related  
activities; and

7 (3) the exercise of jurisdiction must comport with fair  
play and substantial justice, i.e. it must be reasonable.

8 *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d  
9 1416, 1421 (9th Cir. 1987)). "The plaintiff bears the burden of  
10 satisfying the first two prongs of the test. If the plaintiff  
11 fails to satisfy *either* of these prongs, personal jurisdiction is  
12 not established in the forum state." *Schwarzenegger*, 374 F.3d at  
13 802 (emphasis added).

14 The first prong of the specific jurisdiction test refers to  
15 both purposeful direction and purposeful availment. The Ninth  
16 Circuit has "typically analyzed cases that sound *primarily* in  
17 contract . . . under a 'purposeful availment' standard." *Boschetto*,  
18 539 F.3d at 1016 (emphasis added). Because this case sounds  
19 primarily in contract, the Court will conduct a purposeful  
20 availment analysis.

21 "In order to have purposefully availed oneself of conducting  
22 activities in the forum, the defendant must have performed some  
23 type of affirmative conduct which allows or promotes the  
24 transaction of business within the forum state." *Sinatra v.*  
25 *National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988). For  
26 example, "the solicitation of business in the forum state that  
27 results in business being transacted or contract negotiations will  
28 probably be considered purposeful availment." *Id.*

1 "A choice-of-law and/or forum selection clause in an  
2 underlying contract may be instructive in considering the  
3 requirement that the defendant purposefully avails itself of the  
4 privilege of conducting activities within the forum." *Z Plane,*  
5 *Inc. v. Greening Aviation Claims, Inc.*, No. Civ. 04-1666RHKAJB,  
6 2005 WL 741905, at \*6 (D. Minn. Mar. 30, 2005). "[P]rior  
7 negotiations and contemplated future consequences, along with the  
8 terms of the contract and the parties' actual course of dealing"  
9 are factors that should also be considered. *Burger King Corp. v.*  
10 *Rudzewicz*, 471 U.S. 462, 479 (1985).

11 In this case, Export Global has sufficiently met its burden on  
12 the first prong of the test for specific personal jurisdiction.  
13 Export Global "is a corporation organized, existing, and authorized  
14 to do business under the laws fo the State of Oregon, with its  
15 principal place of business located at 620 S.W. Wood Street,  
16 Hillsboro, Oregon." (Jones Decl. ¶ 4.) In early March 2012,  
17 Memking requested and was provided "with a list of items [Export  
18 Global] would be interested in purchasing and the prices [Export  
19 Global] would pay for those items." (Jones Decl. ¶¶ 9-10.) In  
20 early June 2012, Memking's managing member, John Paterson  
21 ("Paterson"), contacted the president of Export Global, Danny Jones  
22 ("Jones"), regarding Export Global's interest in purchasing scrap  
23 computer cables. (Jones Decl. ¶ 5.) Throughout the course of  
24 Export Global's dealings with Paterson, "all communications were  
25 being made to [him] as manager of Defendant Memking, and all  
26 communications from . . . [him] were being made [as a  
27 representative of] Defendant Memking." (Jones Decl. ¶ 6.)

1 After the parties' discussions in early June 2012, Export  
2 Global sent a purchase order to Memking on June 14, 2012. On June  
3 19, 2012, Paterson emailed Export Global an invoice "[f]rom  
4 Mem[k]ing" for \$38,916 worth of scrap computer cables. (Jones  
5 Decl. Ex. B at 1.) On June 21, 2012, Paterson emailed Export  
6 Global two "[p]acking [l]ists from Mem[k]ing"—dated June 19, 2012  
7 and June 21, 2012—for two shipping containers. (Jones Decl. Ex. A  
8 at 1-3.)

9 Export Global sent three more purchase orders to Memking on  
10 June 22, 2012, July 3, 2012, and July 12, 2012. Notably, the July  
11 3, 2012 purchase order, which was attached in Portable Document  
12 Format ("PDF"), listed Memking as the customer and stated:

13 We need a minimum of 6 photos of each container showing  
14 half loaded, closing and seal number and container number  
15 with products showing as this is [a] requirement for  
16 Customs. . . . All disputes in connection with this  
17 execution of the contract thereof shall be settled thru  
friendly negotiations. In [the event] no settlement can  
be reached, the matter will be settled in Oregon Court of  
Law.

18 (Jones Decl. Ex. F at 2.) In accordance with this provision,  
19 Paterson emailed Export Global the required photos pertaining to  
20 Purchase Order No. 10786 on July 11, 2012. (Jones Decl. Ex. C at  
21 1-5.)

22 In the Court's view, Memking has sufficient contact with  
23 Oregon to satisfy the purposeful availment requirement. *Gray & Co.*  
24 *v. Firstenberg Machinery Co.*, 913 F.2d 758 (9th Cir. 1980), on  
25 which Memking relies, is not to the contrary. In that case, Gray  
26 & Company, Inc. ("Gray"), an Oregon corporation, contacted  
27 Firstenberg Machinery Company, Inc. ("Firstenberg"), a California  
28 corporation, regarding a piece of food processing equipment—namely,

1 "a used filter." *Gray*, 913 F.2d at 758. With the help of Polk  
2 Machinery, Inc. ("Polk"), an Illinois corporation, Firstenberg  
3 located a filter in Chicago and sold it to Gray. *Id.* Upon  
4 arrival in Oregon, Gray determined that the filter was inoperable  
5 and demanded that Firstenberg and Polk refund the purchase price or  
6 provide a replacement. *Id.* When they refused, Gray commenced a  
7 diversity action in the United States District Court for the  
8 District of Oregon. *Id.*

9 On appeal, Firstenberg and Polk argued that the district court  
10 lacked personal jurisdiction over them and erred in holding them  
11 liable for breach of warranty. *Id.* at 760. The Ninth Circuit  
12 determined that Firstenberg and Polk's contacts with Oregon were  
13 too attenuated to establish that they purposefully availed  
14 themselves of the benefits and protection of Oregon law:

15 Neither Firstenberg nor Polk had any contact with  
16 Oregon prior to this sale; neither of them had ever  
17 sought or done business in Oregon, or had officers or  
18 agents there. *Their only contacts in connection with*  
19 *this sale consisted of Firstenberg's response to Gray's*  
*solicitation for a filter, Firstenberg's telephone*  
*conversations with Gray, Firstenberg's mailing the*  
*invoice to Gray, and Firstenberg's receipt of payment*  
*from Gray.*

20 As we have said, the fact that a contract was  
21 consummated between Firstenberg and Gray does not  
22 establish purposeful availment. *The course of*  
23 *negotiations consisted of a few phone calls, which Gray*  
*initiated.* There was no formal written contract, only a  
24 routine exchange of an invoice and a purchase order.  
25 There is no evidence the sale contemplated a continuing  
26 relationship between Gray and the defendants. To the  
27 contrary, Firstenberg's invoice stated the sale was 'as  
28 is, where is,' indicating Firstenberg's desire not to be  
responsible for the filter after delivery in Illinois.

Gray argues because Firstenberg knew Gray was in  
Oregon and Gray would bring the filter to Oregon,  
Firstenberg should have anticipated being sued in Oregon  
if something went wrong with the filter. As noted above,



1 foreseeability of injury in the forum does not in itself  
2 establish purposeful availment.

3 *Id.* at 760-61 (emphasis added).

4 Despite Memking's effort to portray *Gray* as directly on point,  
5 the facts can be distinguished on several grounds. First, unlike  
6 *Gray*, the non-resident defendant, Memking, was the one who actually  
7 solicited business in the forum state, not the resident plaintiff,  
8 Export Global. As the emphasized language in the foregoing  
9 quotation suggests, this consideration played an important role in  
10 the *Gray* court's determination. Second, after soliciting Export  
11 Global's business in March 2012 and June 2012, Memking proceeded to  
12 accept four purchase orders (not one purchase order, as was the  
13 case in *Gray*) from Export Global over the period of a month. This  
14 suggests that the parties contemplated a continuing relationship.  
15 Third, and without expressing any opinion as to the validity or  
16 enforceability of any contract, it is worth noting that Memking  
17 performed in accordance with a provision in the July 3, 2012  
18 purchase order that suggested Export Global wanted any legal  
19 dispute to be resolved in Oregon.

20 In short, the Court concludes that the activities described  
21 above sufficiently demonstrate that Memking purposefully availed  
22 itself of the privilege of conducting activities in the forum state  
23 of Oregon.

24 "The second prong of the specific jurisdiction test asks  
25 whether the claim arises out of or results from the Defendants'  
26 forum-related activities." *Mattel, Inc. v. Greiner & Hausser*  
27 *GmbH*, 354 F.3d 857, 864 (9th Cir. 2003). The claims currently  
28 asserted by Export Global sufficiently arise out of or result from

1 Memking's forum-related activities. See *Decker*, 805 F.2d at 840  
2 (determining that a claim arose out of forum-related activities  
3 based on the disruption of the plaintiff's contractual  
4 expectations).

5 As to the third prong, seven factors are considered in  
6 determining whether the exercise of jurisdiction comports with fair  
7 play and substantial justice:

8 (1) the extent of the defendants' purposeful injection  
9 into the forum state's affairs; (2) the burden on the  
10 defendant of defending in the forum; (3) the extent of  
11 the conflict with the sovereignty of the defendant's  
12 state; (4) the forum state's interest in adjudicating the  
dispute; (5) the most efficient judicial resolution of  
the controversy; (6) the importance of the forum to the  
plaintiff's interest in convenient and effective relief;  
and (7) the existence of an alternative forum.

13 *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1080 (9th  
14 Cir. 2011) (citation omitted).

15 After reviewing the pleadings, the Court concludes that  
16 Memking has failed to present a compelling case that this Court's  
17 exercise of personal jurisdiction over it is unreasonable. In  
18 coming to this conclusion, the Court is most persuaded by factors  
19 one, two, four, five, and six.<sup>2</sup>

20 The first factor weighs in favor of Export Global because, on  
21 more than one occasion, Memking has solicited and/or engaged in  
22 business with an Oregon corporation. Memking's actions could also  
23 reasonably be understood as acquiescence to the terms of Export  
24 Global's purchase order indicating that legal matters would be  
25 resolved by an Oregon court.

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28 <sup>2</sup> The third factor is neutral. Neither party identifies any  
issues related to this factor.

1 As to the second factor, the Court finds the burden on Memking  
2 in having to defend this lawsuit in Oregon is minimal. See  
3 *CollegeSource*, 653 F.3d at 1080 (“[W]ith the advances in  
4 transportation and telecommunications and the increasing interstate  
5 practice of law, any burden [of litigation in a forum other than  
6 one’s residence] is substantially less than in days past.”)

7 The fourth factor favors Export Global because Oregon has a  
8 substantial interest in adjudicating disputes involving Oregon  
9 residents. *Nike, Inc. v. Lombardi*, 732 F. Supp. 2d 1146, 1156 (D.  
10 Or. 2010).

11 The most efficient judicial resolution of the dispute would  
12 most likely be in Oregon. As of March 31, 2012, the Northern  
13 District of Texas had 3,914 civil cases pending (up from 3,439 the  
14 previous year), while the District of Oregon had 1,544 (down from  
15 2,393 the previous year). Despite the disparity in the number of  
16 civil cases pending, the number of active judges in each  
17 jurisdiction was roughly the same at the beginning of 2013  
18 (fourteen active and senior district judges and five magistrate  
19 judges in the Northern District of Texas, and eleven active and  
20 senior district judges and six magistrate judges in the District of  
21 Oregon).

22 Although the Ninth Circuit has stated that the sixth factor is  
23 not of paramount importance, *Lombardi*, 732 F. Supp. 2d at 1156, it  
24 clearly favors Export Global.

25 In sum, the Court concludes that Export Global has presented  
26 a prima facie case of purposeful availment by Memking sufficient to  
27 survive a motion to dismiss for lack of personal jurisdiction.

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1 **CONCLUSION**

2 For the reasons stated, Memking's motion (Docket No. 14) to  
3 dismiss should be DENIED.

4 **SCHEDULING ORDER**

5 The Findings and Recommendation will be referred to a district  
6 judge. Objections, if any, are due **October 15, 2013**. If no  
7 objections are filed, then the Findings and Recommendation will go  
8 under advisement on that date. If objections are filed, then a  
9 response is due **November 1, 2013**. When the response is due or  
10 filed, whichever date is earlier, the Findings and Recommendation  
11 will go under advisement.

12 Dated this 26th day of September, 2013.

13 /s/ Dennis J. Hubel

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15 DENNIS J. HUBEL  
16 United States Magistrate Judge  
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